No. 12258.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

B. H. STAUFFER and STAUFFER SYSTEM, INC.,

Appellants,

vs.

KATHLEEN EXLEY,

Appellee.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS.

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This is in reply to "Brief of Appellee." Appellee has failed squarely to answer or to face the arguments previously made herein by appellants. However, appellants meet in the following argument the collateral point interjected by appellee.

Summary of Argument.

ARGUMENT.

A. Appellants Have Proved That Original Jurisdiction Lies in the United States District Courts in Unfair Competition Actions Such as the Case Herein by Virtue of the Lanham Act and 28 U. S. C. 1337.

I.

In our opening brief we showed that jurisdiction of the District Court of the case herein is required by the Trade-Mark Act of July 5, 1946 (Public Law 489, 79th Congress, Chapter 540, 2nd Session, 15 U. S. C. 1051-1127). This is popularly known as the Lanham Act. We pointed out also that jurisdiction of the District Court is specifically set out in Section 39 of the Lanham Act (15 U. S. C. 1121).

Also we showed that jurisdiction is given to the District Courts by the provisions of 28 U. S. C. 1337 which reads:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

In our opening brief we quoted the title of the Lanham Act:

> "An act to provide for the registration and *protection* of *trade-marks* used *in commerce,* to carry out the provisions of certain international conventions, and for other purposes." (Emphasis ours.)

The regulation of trade-marks used in commerce and the protection of commerce against unfair restraints is within the purview and scope of the Lanham Act.

B. Appellee Does Not Deny That the Lanham Act Gave Jurisdiction to the United States District Courts in Actions Such as the One Herein.

The reply brief of appellee carefully avoids contention with the argument of appellants. By failure to resist appellants' argument appellee has *admitted* that both the Trade-Mark Act of 1946 and 28 U. S. C. 1337 confer jurisdiction to the District Courts of the United States in simple actions for unfair competition.

In substitution for argument upon the merits, appellee refers to 15 U. S. C. 1338 which purports only to enact the decisional law of *Hurn v. Oursler,* a case decided in 1933. The Lanham Act became effective July 5, 1947.

Appellee also refers to repeal by implication, and having set up this straw man, rests.

C. Appellee's Sole Argument That the New Judicial Code Repeals by Implication the Jurisdictional Portions of the Lanham Act Is Erroneous.

Appellee's sole point, "THE NEW JUDICIAL CODE IS A COMPLETE REVISION OF THE EXISTING LAWS GOVERNING JURISDICTION OF THE DISTRICT COURTS AND EMBRACES THE ENTIRE SUBJECT OF JURISDICTION SUPERSEDING ALL PRIOR LAWS" is vitiated by the express provisions of the New Judicial Code. Appellee's argument is the flimsy theory of repeal by implication which as stated by appellee is that enactments and revisions of codes designed to embrace the entire subject of legislation operate to repeal former acts dealing with the same subjects.

Specific provisions of the New Judicial Code provide for specific repeal of statutes to be repealed and categorically prohibit the application of a theory of implied repeal.

In view of the foregoing, the argument of appellee as to implied repeal becomes illusory and groundless as the following authorities hold:

". . . When such intention of the legislature can be ascertained, it is the duty of the courts to give it force and effect, since the intent of the law is its vital force, and the province of the courts is to ascertain and effectuate the valid legislative intent. Indeed, one statute will not be held to repeal another by implication unless it appears, from the terms and provisions of the later act, that it was the intention of the legislature to enact a new law in place of the old . . ."

50 Am. Jur., Statutes, §535.

"Repeals by implication are not favored . . ."

50 Am. Jur., Statutes, §538.

". . . As a general rule, the legislature, when it intends to repeal a statute, may be expected to do so in express terms or by the use of words which are equivalent to an express repeal, and an intent to repeal by implication, to be effective, must appear clearly, manifestly, and with cogent force. The implication of a repeal, in order to be operative, must be necessary, or necessarily follow from the language used, because the last or dominant statute admits of no other reasonable construction. The courts will not hold to a repeal if they can find reasonable ground to hold the contrary, if two constructions are possible, that one will be adopted which operates to support the earlier act, rather than to repeal it by implication."

50 Am. Jur., Statutes, §538.

". . . Except where an act covers the entire subject-matter of earlier legislation, is complete in itself, and is evidently intended to supersede the prior legislation on the subject, a later act does not by implication repeal an earlier act unless there is such a clear, manifest, controlling, necessary, positive, unavoidable, and irreconcilable inconsistency and repugnancy, that the two acts cannot, by a fair and reasonable construction, be reconciled, made to stand together, and be given effect or enforced concurrently . . ."

50 Am. Jur., Statutes, §543.

"Sometimes, a repeal by implication is negatived by express provision of the statute . . . The usual function of a saving clause is not to create something, but to preserve something from immediate interference . . ."

50 Am. Jur., Statutes, §550.

"The general principle of interpretation, that the mention of one thing implies the exclusion of another (*expressio unius est exclusio alterius*), has been regarded as applicable where an act makes substantive provisions and then expressly repeals specified acts, so as to repel an inference that acts not specified are impliedly repealed . . ."

50 Am. Jur., Statutes, §551.

". . . Of course, if the revision or codification specifically exempts from repeal certain designated laws, such laws are not repealed by the revision or codification."

50 Am. Jur., Statutes, §557.

D. The New Judicial Code Expressly Negatives Repeal by Implication.

The only statutes repealed by amendments to the Judiciary Code have been specifically enumerated.

The paper-backed United States Code, Congressional Service, 80th Congress, 2nd Session 1948, entitled "New Title 28, United States Code, Judiciary and Judicial Procedure with Official Legislative History and Reviser's Notes" (referred to in appellee's brief) contains Section 39, at page 1648. This reads:

> "The sections or parts thereof of the Revised Statutes of the District of Columbia, Revised Statutes of the United States or Statutes at Large enumerated in the following schedule are hereby repealed. Any rights or liabilties now existing under such sections or parts thereof shall not be affected by this repeal."

At page 1670 which contains a portion of the schedule of laws repealed, including statutes at large and United States Code, and specifically the laws enacted in the year 1946 which are repealed, it will be seen that no provision of the Lanham Act or Trade-Mark Act of July 5, 1946, has been repealed.

At page 1699 of the same paper-backed edition of the United States Code is contained this paragraph in the section entitled "Legislative History—House":

> "Section 35 and 36 provide for the specific repeal of all laws incorporated in the revision and other superseded and obsolete revisions relating to the courts. The schedule was carefully checked and re-checked many times. *This method of specific repeal will relieve the courts of the burdensome task of ferreting out implied repeals.*" (Emphasis added.)

E. Conclusion.

Appellee does not deny that the Lanham Act gave jurisdiction to the United States District Courts in simple actions for unfair competition. Appellee's argument that this jurisdiction has been impliedly repealed is controverted by express terms of the New Judicial Code. Appellants should prevail in this appeal.

Signed at Los Angeles, California, this 4th day of October, 1949.

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